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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	§	
	§	
FIREWATER INVESTMENTS, LTD.,	§	CASE NO. 02-21069-RLJ-11
	§	
Debtor	§	
<hr/>		
MISSOURI VALLEY, INC.,	§	
	§	
Plaintiff	§	
	§	
v.	§	ADVERSARY NO. 02-2037
	§	
PANHANDLE WATER WORKS I, LTD.,	§	
	§	
Defendant	§	

MEMORANDUM OPINION

Panhandle Water Works I, Ltd. ("PWWI"), defendant in this adversary proceeding, moves for summary judgment on the claims brought by Missouri Valley, Inc., the plaintiff, under its original complaint. Missouri Valley filed its response opposing the motion for summary judgment.

A party against whom a claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim. *See* FED. R. CIV. P. 56(b). Summary judgment is proper if the pleadings and the summary judgment evidence submitted in support of the motion show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v.*

Liberty Lobby Inc., 477 U.S. 242, 250 (1986); *Washington v. Armstrong Wold Indus. Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). When a defendant moves for summary judgment on the plaintiff's claim, the defendant may satisfy its summary judgment burden by either submitting summary judgment evidence that negates the existence of a material element of the plaintiff's claim or by showing that there is no evidence to support an essential element of the plaintiff's claim. *See Celotex*, 477 U.S. at 322-25, 106 S.Ct. at 2552-54.

In support of its motion, PWWI has submitted summary judgment evidence that establishes the following:

1. On September 9, 1999 Firewater Investments, Ltd. ("Firewater"), the debtor in the underlying bankruptcy case, signed a promissory note in the amount of \$2,150,000, made payable to Santana Corporation ("Santana"). *See* SJ Ex. 1.
2. The promissory note was executed in connection with the construction of the Firewater Water Park by Firewater. *See* SJ Exs. 2, 4, 12.
3. Firewater assigned its construction contract to Santana by assignment dated September 9, 1999. *See* SJ Ex. 2.
4. Problems developed in connection with the construction contract; a lawsuit was filed by Santana against Firewater and several individuals in the District Court for Potter County, Texas. *See* SJ Ex. 3.
5. On August 9, 2002, Santana assigned the September 9, 1999, note and liens securing such note to PWWI, which was formed by "some of the limited partners of Firewater." *See* SJ Ex. 4.
6. The purpose of forming PWWI was to allow certain limited partners to pool their resources in an attempt to purchase the promissory note from Santana. *See* SJ Ex. 5.
7. On December 3, 2002, PWWI conducted a foreclosure sale of real property and personal property securing the note; PWWI was the high bidder at both sales. SJ *See id.*

8. The real property of Firewater sold for a price of \$1,500,000; the personal property sold for a price of \$98,973. *See id.*

It is also undisputed, as evidenced by the pleadings filed by both PWWI and Missouri Valley, that the September 9, 1999, note was guaranteed, at least in part, by some of the limited partners of Firewater, and that the guarantors were released by PWWI after PWWI purchased the note and liens from Santana. *See Missouri Valley's Original Complaint* ¶ 5; *see PWWI's Motion for Summary Judgment* ¶ 4.

In response to the summary judgment proof proffered by PWWI, Missouri Valley submitted the affidavit of George Cumming, Jr., President of Missouri Valley. Mr. Cumming testified that he was approached by Gary Abramson, representative of Firewater, regarding Missouri Valley's construction of the Firewater Water Park. Cumming specifically testified that Mr. Abramson represented that the:

financial commitment of the shareholders [of Firewater] as being a cash-up-front commitment plus an additional guaranty of money in the event that there was a need for more investment Further, he indicated that there was very little chance of needing any additional funds, but that the guaranty had been required by Santana, his construction funds lender, as a matter of course. He further suggested to me that it provided an additional cushion to cover any additional expense encountered by Missouri Valley in the park construction.

Missouri Valley, Inc. relied on Mr. Abramson's representations and on the representations of his consultant as to the economic viability of the project and availability of funds. . . . We were repeatedly reminded by Mr. Abramson of the safety net provided by the guaranties of the partners of Firewater Investments, Ltd. in the event any additional equity was need [sic] to build the Water Park.

SJ Ex. 12.

Missouri Valley's complaint recites that the September 9, 1999, note from Firewater to Santana was guaranteed by Firewater's limited partners. *See Missouri Valley's Original*

Complaint ¶ 4. It further states that Missouri Valley holds a debt of approximately \$975,000, which was subordinated to Santana's lien to "facilitate the transaction." *Id.* Missouri Valley contends that PWWI, which purchased the note from Santana, is a limited partnership "consisting of the same, or substantially similar, limited partners as those of" Firewater. Missouri Valley then alleges that PWWI's release of the guarantors "reduced the equity structure of [Firewater] by the amount of such released debt." According to Missouri Valley, this chain of events – particularly the release of the guarantors – constitutes a sham transaction that destroyed Firewater's equity structure and thus "unfairly affected" Missouri Valley and other creditors. *Id.* at ¶ 6. Missouri Valley states it would not have subordinated its lien had it known that the guarantors would participate in such a transaction. *See id.* Missouri Valley specifically requests that judgment be entered subordinating PWWI's lien on the debtor's assets to those of Missouri Valley and Firewater's other unsecured creditors. *See id.* at P. 3.

The affidavit of George Cumming, Jr. indicates that Gary Abramson, on behalf of Firewater, assured Missouri Valley that the "shareholders" of Firewater would provide additional equity contributions if needed for the project. SJ Ex. 12. This is different than a traditional guaranty under which the guarantor's obligation flows to the lender, in this case, Santana. An obligation to provide additional equity contributions would flow to Firewater. There is no dispute that certain limited partners guaranteed at least a portion of the debt held by Santana and subsequently purchased by PWWI. Missouri Valley complains of PWWI's release of the guarantors; indeed the release lies at the very heart of its complaint. Any inference that the limited partners "guaranteed" or promised to provide additional equity contributions is

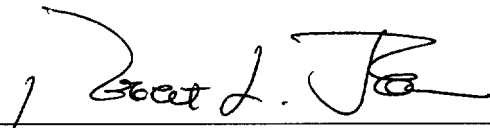
inconsistent with Missouri Valley's cause of action. PWWI could not release the guarantors if they were obligated to provide additional equity contributions.

Perhaps the complaint and Mr. Cumming's affidavit can be construed to allege that Missouri Valley relied on a false representation that the limited partners would continue to fund Firewater as needed for the construction. The problem with such theory, however, is that the representation made was made by Firewater, not PWWI or its limited partners. Missouri Valley advances no legal theory that justifies holding PWWI responsible for such representation.

Finally, the sole remedy sought by Missouri Valley is subordination of PWWI's lien. PWWI holds no lien as it was foreclosed on December 3, 2002.

Upon the foregoing, the only factual issue concerns the nature of the so-called guaranties. Missouri Valley makes, at most, a conclusory allegation, supported by vague testimony from Mr. Cumming, that it relied on a representation that the "shareholders" would provide additional capital. This cannot overcome undisputed evidence, as well as Missouri Valley's admission through its pleadings, that the limited partners executed guaranties in favor of Santana. Indeed, Missouri Valley argues that the release of the guarantors by PWWI is part of an overall "sham" transaction. The summary judgment evidence and pleadings negate the existence of any material fact regarding the nature of the guaranties. In addition, no showing has been made by Missouri Valley that PWWI made a false representation or that it (Missouri Valley) is entitled to the relief sought. The court will grant PWWI's motion for summary judgment.

DATED June 6, 2003.



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE